Allied Mechanical Services, Inc. *and* Plumbers and Pipe Fitters Local 337, United Association of Journeymen and Apprentices of the Plumbing and Pipe Fitting Industry of the United States and Canada, AFL–CIO. Cases 7–CA–38022, 7–CA–38204, 7–CA–38440, 7–CA–38881, 7–CA–39213, and 7–CA–39872

January 5, 2001

DECISION AND ORDER

BY CHAIRMAN TRUESDALE AND MEMBERS LIEBMAN AND HURTGEN

On February 9, 1998, Administrative Law Judge Richard H. Beddow, Jr. issued the attached decision. The Respondent filed exceptions and a supporting brief, and the General Counsel and the Charging Party filed answering briefs.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,[1] and conclusions as modified and to adopt the recommended Order as modified and set forth in full below.[2]

1. The judge found that employees Todd Hayes, Jeff Kiss, Mark Lemmer, Ron Parlin, Jeff Warren, and Kirk Wood had engaged in a protected unfair labor practice strike. The Respondent argues that a July 26, 1996 conversation reveals that Hayes and Kiss were engaged in an economic strike and were not entitled to immediate reinstatement. We find no merit in this argument.

The facts, as more fully set forth by the judge, may be summarized as follows. On July 26, 1996, discharged strikers Todd Hayes and Jeff Kiss visited the Respondent's office and spoke with John Huizinga, the Respondent's owner and president. In this conversation, Hayes and Kiss offered to return to work from their strike. Huizinga asked them why they had gone on strike and what it would take for them to end their walkout. Both responded that they wanted higher wages. When Huizinga informed them that he would not pay them higher wages if they returned, they left.

In arguing that the 1996 strike was an economic strike, the Respondent ignores the judge's findings that: (1) Union Organizer Knapp and the employees had discussed engaging in a strike to protest the Respondent's unfair labor practices before the May 28, 1996 strike began; (2) when this strike began, the Respondent was notified that its "refusal to bargain in good faith and the other unfair labor practices set forth in the most recent National Labor Relations Board complaint [was] the reason for the unfair labor practice strike"; and (3) on their joining the strike, Hayes and Kiss were unlawfully fired for their strike participation and, as discharged strikers, were entitled to immediate reinstatement by the Respondent. Accordingly, we adopt the judge's finding that the above-named employees were unfair labor practice strikers.

2. The judge concluded that the Respondent had an obligation to bargain with the Union before it granted the discretionary merit raises to its employees on July 26, 1996. In support of its exception to the judge's conclusion, the Respondent cites *Hyatt Corp. v. NLRB*, 939 F.2d 361, 370 (6th Cir. 1991), for the proposition that an employer need only be "willing to confer with the union if the [discretionary] wages are questioned" and "it need not bargain *before* it grants the raise [emphasis in original]." In our view, the Respondent has misinterpreted *Hyatt*, which we find to be factually distinguishable.

In *Hyatt,* the Board found that an employer had unlawfully discontinued its existing wage-adjustment policy during contract negotiations without giving the union notice and opportunity to bargain. In affirming the Board's finding, the court held that the employer was not precluded from following its existing practice of granting merit wage increases simply because such increases contained a discretionary element. In this context, the court noted:

[1] The Respondent has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

In sec. II, par. 1 of his decision, the judge correctly found that on July 30, 1991, the Respondent voluntarily recognized the Union as the collective-bargaining representative of its plumbers, pipefitters, welders, and shop employees. However, elsewhere in his decision, the judge inadvertently referred to the Union as the "certified" bargaining representative of the unit employees. We have modified the recommended Order and notice to employees to accurately reflect voluntary recognition of the Union.

[2] The judge correctly found that the record was insufficient to show any independent violation of the Act based on the Respondent's failure to prepare evaluations for Todd Hayes, Jeff Kiss, Mark Lemmer, Ron Parlin, Jeff Warren, and Kirk Wood. Thus, there was no obligation on the part of the Respondent to create such documents. However, in par. 2(d) of his recommended Order, the judge mistakenly ordered the Respondent to furnish "copies of evaluations to Todd Hayes, Jeff Kiss, Mark Lemmer, Ron Parlin, Jeff Warren, and Kirk Wood." We have modified the recommended Order to delete this requirement.

We have modified the recommended Order to include a broad cease-and-desist order and an affirmative bargaining order, to more accurately reflect the violations found by the judge, and in accordance with our decisions in *Indian Hills Care Center*, 321 NLRB 144 (1996), and *Excel Container*, 325 NLRB 17 (1997).

> Where the company wishes to continue the practice of granting partly discretionary wage increases, it may do so during the bargaining period without violating the labor laws so long as it is willing to confer with the union if the wages are questioned. In other words, it need not bargain *before* it grants the raise." [Emphasis in original.]

Id. (citing *NLRB v. Blevins Popcorn Co*., 659 F.2d 1173, 1189 fn. 98 (D.C. Cir. 1981)). However, the Sixth Circuit further explained that in those circumstances the employer "was required to bargain with the Union over whether to discontinue the increase or grant the increase and bargain over the discretionary factors if requested to do so by the Union." Id.

In contrast to the situation presented in *Hyatt*, the Respondent here altered its past practices of granting merit increases, without giving the Union notice and an opportunity to bargain about the change. In 1996, Owner Huizinga exercised more discretion in terms of whether employees received raises at all and the amount of the raises they received, e.g., the discretionary cost-of-living wage adjustments. Furthermore, the Respondent failed to respond to the Union when the latter questioned the wage increases and sought copies of the employees' evaluations and the implemented changes to the compensation package.

3. In paragraph 2(d) of his recommended Order, the judge directed the Respondent to provide "a copy of information regarding COBRA coverage for Todd Hayes and Kirk Wood." The Respondent excepts to this remedy and urges us to find that it has no obligation to provide the requested information under the Consolidated Omnibus Budget Reconciliation Act (COBRA).[3] We find no merit in this exception.

The amended consolidated complaint alleges that by letters dated June 7, 11, and 17, 1996, the Union requested that the Respondent "furnish it with information in regard to what steps the Respondent was taking under COBRA to provide health insurance coverage to Todd Hayes and Kirk Wood." COBRA requires, inter alia, that an employer, as an administrator of a health insurance plan, provide continued health insurance coverage to an eligible employee whose employment is terminated (other than by reason of such employee's gross misconduct) and to notify him of the right to elect such coverage upon his termination from employment. It is undisputed that the Respondent received the June letters and failed to furnish any COBRA information regarding Hayes and Wood to the Union.

An employer has a duty to furnish requested information to a union which is the collective-bargaining representative of the employees if the requested information is relevant and reasonably necessary to the union's performance of its responsibilities. See *NLRB v. Acme Industrial Co.*, 385 U.S. 432 (1967). The standard for determining the relevance of the requested information is a liberal one, and it is necessary only to establish "the probability that the desired information is relevant, and that it would be of use to the union in carrying out its statutory duties and responsibilities." Id. at 437. We find that the requested insurance information is presumptively relevant for purposes of collective bargaining and processing grievances and must be furnished on request. See *Deadline Express*, 313 NLRB 1244 fn. 1 (1994).

4. In paragraph 2(d) of his recommended Order, the judge directed that the Respondent must "hold meetings with employees Jon and Joel Kinney and Tobin Rees [with representatives of the Charging Party present, if requested by the employees] to discuss their evaluations." The Respondent claims that the record fails to support this portion of the judge's recommended remedy. For the reasons discussed below, we adopt the judge's remedy.

The judge found that on July 26, 1996, John Huizinga, the Respondent's owner and president, conducted employee evaluations and issued employee raises. He further found that, in accordance with the Respondent's practice in 1995, shortly after employees received their 1996 evaluations with their proposed raises, the employees were allowed to meet individually with Huizinga and negotiate directly with him for a higher raise. Jon Kinney testified that on or about August 1, 1996, he contacted Huizinga's secretary to arrange a meeting with Huizinga or another representative of the Company to review his evaluation. According to Kinney's uncontested testimony, a meeting with Huizinga never occurred because the secretary "told [Kinney] not to bother." Similarly, his brother Joel Kinney testified that he also requested, but was denied, a meeting with Huizinga to discuss his evaluation. However, Tobin Rees testified that he never requested to meet with Huizinga or another company official to discuss his 1996 evaluation.

The judge found that the Respondent had a duty to bargain about the amount of raises that employees received in 1996. He found that the Respondent violated Section 8(a)(1) and (5) of the Act by implementing these discretionary July 1996 raises without giving the Union notice and opportunity to bargain. In accordance with this finding, the judge ordered that upon the Union's request the Respondent must rescind all or part of these unilateral wage increases, which would include those for

[3] 29 U.S.C. § 1161 et seq.

Jon and Joel Kinney and Tobin Rees. Thus, we note that if the Union requests bargaining about the 1996 wage increases for the Kinney brothers and Rees, then each employee is entitled, under the Respondent's established past practice, to a meeting with Huizinga to discuss his evaluation regardless of whether he may have requested such a meeting in 1996 when the rescinded raises were unlawfully implemented.

5. By letter dated May 20, 1996, Knapp requested a copy of the Respondent's "emergency action plans at all of [the Respondent's] current and upcoming job-sites." The judge found that the Respondent's failure to respond to the Union's request violated Section 8(a)(1) and (5) of the Act. The judge recommended that the Respondent be ordered to furnish the Union with a copy of its emergency action plan. However, the Respondent argues, inter alia, that there is no factual basis for the judge's finding and corresponding remedy. We find merit in the Respondent's argument.

Owner Huizinga testified without contradiction that the Respondent did not have an emergency action plan. He further testified that Michael T. Mason, a representative for the State of Michigan, informed him that his company was not required to write such a plan. Thus, the evidence is insufficient to establish either the existence of an "emergency action plan" or an obligation on the part of the Respondent to create such a document to distribute to the Union. See *Whittier Area Parents Assn.*, 296 NLRB 817 fn. 2 (1989); *Bendix Corp.*, 242 NLRB 62 (1979). Accordingly, we have deleted this requirement from the judge's recommended Order.[4]

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge as modified and set forth in full below and orders that the Respondent, Allied Mechanical Services, Inc., Kalamazoo, Michigan, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Terminating employees because they engaged in a lawful unfair labor practice strike.

(b) Failing and refusing to reinstate striking employees who make valid unconditional offers to return to work.

(c) Unilaterally making changes in terms and conditions of employment that are mandatory subjects of bargaining after voluntarily recognizing Plumbers and Pipe Fitters Local 337, United Association of Journeymen and Apprentices of the Plumbing and Pipe Fitting Industry of the United States and Canada, AFL–CIO as the exclusive representative of the unit employees without notice to or bargaining with the Union, including granting wage increases, implementing new disability insurance benefits and a new health insurance plan, and making changes in its apprenticeship training program.

(d) Refusing to timely furnish the Union with information requested and needed in the performance of its duties as exclusive collective-bargaining representative.

(e) Bypassing the Union and dealing directly with employees with regard to a new health insurance plan by meeting with employees and excluding union representatives.

(f) Failing to bargain in good faith by engaging in overall conduct during negotiations and away from the bargaining table, including statements that it had no intention of ever executing a contract with the Union, failure to provide the Union with requested information needed in the performance of the Union's duties as exclusive collective-bargaining representative, unilateral implementation of changes in terms and conditions of employment, failure to bargain about such changes that are mandatory subjects of bargaining, failure to respond to the Union's communications, failure to agree to dates for bargaining, and refusal to meet with the Union during the pendency of unfair labor practice charges.

(g) In any other manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Within 14 days from the date of this Order, offer Todd Hayes, Jeff Kiss, Mark Lemmer, Ron Parlin, Jeff Warren, and Kirk Wood full reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed.

(b) Make all the employees referred to in paragraph 2(a) above whole for any loss of earnings and other benefits suffered as a result of the discrimination against them in the manner set forth in the remedy section of the decision.

[4] Member Hurtgen would include the "mediation" remedy he advocated in *Altorfer Machinery Co.*, 332 NLRB No. 12 (2000), and *Burrows Paper Corp.*, 332 NLRB No. 15 (2000). In his view, such a remedial provision would not offend Sec. 4 of the Act. Although that section forbids the Board to "appoint" mediators and conciliators, it is clear that, in context, the provision refers to people whom the Board would hire and pay. By contrast, the *Altorfer/Burrows* remedial provision would require the Respondent to pay for the services. Accordingly, Member Hurtgen does not believe that Congress intended Sec. 4 as a limitation on the Board's broad remedial power under Sec. 10.

On a different matter, Member Hurtgen would add to par. 2(f) of the Order. As it now reads, the Order permits the Union to choose between retaining a given unilateral change or rejecting it. Member Hurtgen would not confine the Union to that choice. He would add the option of having the change apply to some employees (e.g., extant employees) and having it not apply to others (new employees).

(c) Within 14 days from the date of this Order, remove from its files any reference to the unlawful discharges of the employees referred to in paragraph 2(a) above and within 3 days thereafter notify the employees in writing that this has been done and that the discharges will not be used against them in any way.

(d) Furnish the Union with copies of the information requested, orally or in writing, on the following dates: July 19, October 24, November 9 and 22, 1995; and January 30, February 2, May 17 and 21, June 7, 11, and 17, August 2, October 10, and November 14, 1996. This information includes unit employees' annual evaluations and any changes in working conditions and compensation since January 1, 1994; a copy of the old insurance plan and a copy of all changes made to the old insurance plan; a copy of its hazard communications policy and a list of all hazardous chemicals that unit employees may come in contact with; a copy of all recordable illnesses and injuries for the last 5 years; a copy of information in regard to COBRA coverage for Todd Hayes and Kirk Wood; copies of any changes in its apprenticeship training program and employee evaluation program; names of the employees enrolled at each site for the apprenticeship training program; how it was decided that classes would be separated; names of the employees not currently enrolled at either apprenticeship training program site and their classifications; copy of attendance and training requirements and procedures for each apprenticeship training program site; names, addresses, classifications, hire dates, and pay rates for all bargaining unit employees for the past 2 years; clarifications and explanation of its temporary and/or high school employees in the work force listing the names of such employees, their job descriptions, duties, hours of work, pay rates and hire dates, and layoff/hire procedures for such employees; and clarification of its hire, layoff, and recall procedures for employees.

(e) On request, bargain with the Union as the exclusive bargaining representative of the employees in the following appropriate unit on terms and conditions of employment and, if an understanding is reached, embody the understanding in a signed agreement:

> All full-time and regular part-time plumbers, plumber apprentices, pipe fitters, pipe apprentices, welders, plumbing and pipe fitting service employees and shop employees employed by the Respondent at and out of its facility located at 2211 Miller Road, Kalamazoo, Michigan; but excluding office clerical employees, professional employees, guards and supervisors as defined in the Act and all other employees.

(f) On request of the Union, rescind all or part of the unilateral changes in terms and conditions of employment of unit employees and retroactively restore preexisting terms and conditions of employment, until such time as it negotiates with the Union in good faith to impasse or agreement.

(g) On request, hold meetings with employees Jon and Joel Kinney and Tobin Rees, with union representatives present if they so desire, to discuss their evaluations.

(h) Preserve and, within 14 days of a request, make available to the Board or its agents for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amount of backpay due under the terms of this Order.

(i) Within 14 days after service by the Region, post at its Kalamazoo, Michigan office copies of the attached notice marked "Appendix."[5] Copies of the notice, on forms provided by the Regional Director for Region 7, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since July 19, 1995.

(j) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

[5] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

Section 7 of the Act gives employees these rights.

To organize
To form, join, or assist any union
To bargain collectively through representatives of their own choice
To act together for other mutual aid or protection
To choose not to engage in any of these protected concerted activities.

WE WILL NOT terminate employees because they engaged in a lawful unfair labor practice strike.

WE WILL NOT fail and refuse to reinstate striking employees who make valid unconditional offers to return to work.

WE WILL NOT unilaterally make changes in terms and conditions of employment that are mandatory subjects of bargaining after voluntarily recognizing Plumbers and Pipe Fitters Local 337, United Association of Journeymen and Apprentices of the Plumbing and Pipe Fitting Industry of the United States and Canada, AFL–CIO as the exclusive representative of the unit employees without notice to or bargaining with the Union, including granting wage increases, implementing new disability insurance benefits and a new health insurance plan, and making changes in our apprenticeship training program.

WE WILL NOT refuse to timely furnish the Union with information requested and needed in the performance of its duties as the exclusive bargaining representative.

WE WILL NOT bypass the Union and deal directly with employees with regard to a new health insurance plan by meeting with employees and excluding union representatives.

WE WILL NOT fail to bargain in good faith by engaging in overall conduct during negotiations and away from the bargaining table, including statements that we had no intention of ever executing a contract with the Union, failure to provide requested information needed in the performance of the Union's duties as exclusive collective-bargaining representative, unilateral implementation of changes in terms and conditions of employment, failure to bargain about such changes that are mandatory subjects of bargaining, failure to respond to the Union's communications, failure to agree to dates for bargaining, and refusal to meet with the Union during the pendency of unfair labor practice charges.

WE WILL NOT in any other manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL, within 14 days from the date of the Board's Order, offer Todd Hayes, Jeff Kiss, Mark Lemmer, Ron Parlin, Jeff Warren, and Kirk Wood full reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed.

WE WILL make all the employees listed in the previous paragraphs whole for any loss of earnings and other benefits resulting from their discharges, less any net interim earnings, plus interest.

WE WILL, within 14 days from the date of the Board's Order, remove from our files any reference to the unlawful discharges of all the employees listed in the previous paragraph, and WE WILL, within 3 days thereafter, notify them in writing that this has been done and that the discharges will not be used against them in any way.

WE WILL furnish the Union with copies of the information requested, orally or in writing, on the following dates: July 19, October 24, November 9 and 22, 1995; and January 30, February 2, May 17 and 21, June 7, 11, and 17, August 2, October 10, and November 14, 1996.

WE WILL, on request, bargain with the Union as the exclusive bargaining representative of our employees in the following appropriate unit on terms and conditions of employment, and if an understanding is reached, embody the understanding in a signed agreement:

> All full-time and regular part-time plumbers, plumber apprentices, pipefitters, pipe apprentices, welders, plumbing and pipe fitting service employees and shop employees employed by the Employer at and out of its facility located at 2211 Miller Road, Kalamazoo, Michigan; but excluding office clerical employees, professional employees, guards and supervisors as defined in the Act and all other employees.

WE WILL, on request of the Union, rescind all or part of the unilateral changes in terms and conditions of employment of unit employees and retroactively restore preexisting terms and conditions of employment, until such time as we negotiate with the Union in good faith to impasse or agreement.

WE WILL hold meetings with employees Jon and Joel Kinney and Tobin Rees, with union representatives present if they so desire, to discuss their evaluations.

ALLIED MECHANICAL SERVICES, INC.

A. Bradley Howell, Esq., for the General Counsel.
Gary A. Chamberlin, Craig H. Lubben, and *Barry R. Smith, Esqs.,* of Kalamazoo, Michigan, for the Respondent.
Tinamarie Pappas, Esq., of Ann Arbor, Michigan, for the Charging Party.

DECISION

STATEMENT OF THE CASE

RICHARD H. BEDDOW, JR., Administrative Law Judge. This matter was heard in Grand Rapids, Michigan, on February 11 through 14 and September 15 and 16, 1997. Subsequent to an extension in the filing date briefs were filed by each party. The proceeding is based on a charge filed January 9, 1996,[1] by Plumbers and Pipe Fitters Local 337, United Association of Journeymen and Apprentices of the Plumbing and Pipe Fitting Industry of the United States and Canada, AFL–CIO. The Regional Director's complaint dated March 14, 1996, as subsequently amended and consolidated with the embraced cases, alleges that Respondent, Allied Mechanical Services, Inc., of Kalamazoo, Michigan, violated Section 8(a)(1), (3), and (5) of the National Labor Relations Act by refusing to reinstate striking employees who made unconditional offers to return to work by precluding these employees from qualifying for vacation benefits and by denying their request for accrued vacation benefits; by telling these employees they would be considered to have voluntarily quit and terminating their employment; by refusing to bargain in good faith with the Union by advising it that Respondent had no intention of ever executing a contract, by unilaterally implementing a new insurance benefit for unit employees, implementing a new health insurance plan and granting wage increases to unit employees; by laying off or reduce the hours of work of bargaining unit employees; by changing its existing employee evaluation program and its existing apprenticeship training program without notice to the Union; by dealing with employees without affording the Union an opportunity to bargain with Respondent and by dealing directly with employees with regard to its new health insurance plan without allowing representatives of the Union to the present; by failing and refusing to furnish in a timely manner information requested by the Union and by refusing to meet and bargain with the Union.

On a review of the entire record in this case and from my observation of the witnesses and their demeanor, I make the following

FINDINGS OF FACT

I. JURISDICTION

Respondent is a corporation engaged in the fabrication and nonretail installation of heating, plumbing, and air conditioning systems in the construction industry in the Kalamazoo area and it annually purchases and receives goods and materials valued in excess of $50,000 directly from points outside Michigan. It admits that at all times material it has been an employer engaged in operations affecting commerce within the meaning of Section 2(2), (6), and (7) of the Act. It also admits that the Union is a labor organization within the meaning of Section 2(5) of the Act.

II. THE ALLEGED UNFAIR LABOR PRACTICES

Pursuant to a settlement agreement in Case 7–CA–32727 the Respondent since July 30, 1991, has recognized the Union as the collective-bargaining representative of Respondent's employees in the following unit:

> All full-time and regular part-time plumbers, plumber apprentices, pipe fitters, pipe apprentices, welders, plumbing and pipe fitting service employees and shop employees employed by the Employer at and out of its facility located at 2211 Miller Road, Kalamazoo, Michigan; but excluding office clerical employees, professional employees, guards and supervisors as defined in the Act and all other employees.

While some collective-bargaining negotiations have occurred, no contract has been agreed to.

During the last several years the Respondent has been the subject of numerous charges filed by the Union and numerous unfair labor practice complaints issued by the Regional Director. Three of those charges were heard by me and resulted in the decision set forth in *Allied Mechanical Services,* 320 NLRB 32 (1995). In those cases, Respondent was found by the Board to have committed a series of unfair labor practices, including, but not limited to, refusing to reinstate nine striking employees following their unconditional offers to return to work. Although the Respondent appealed that decision, it was upheld and enforced by the court in *Allied Mechanical Services v. NLRB*, 113 F.2d 623 (6th Cir. 1997), and thereafter, on July 9, 1997, the Respondent offered reinstatement to the discriminatees.

Beginning in 1995 and continuing through 1996 (while the Board's decision was being appealed), union organizer David Knapp conducted weekly meetings with several of the Respondent's employees, most of whom were union members who received supplement pay from the Union to compensate for the employers less than union scale wage rates and to act as union organizers. Other employees who had chosen not to participate in the Union's so-called "salting" program also attended these weekly meetings at their choosing. A primary purpose of the weekly meetings was to allow Knapp to inform employees about the status of pending unfair labor practice matters and to obtain feedback from the employees regarding any other job-related concerns. At some point in early 1996, the employees and Knapp also began discussing the possibility of utilizing strike activity to pressure Respondent to remedy its prior unlawful actions and to discourage it from engaging in further unfair labor practices. The employees indicated support for the general concept of utilizing a strike to exert economic pressure on Respondent. On February 20, 1996, the Respondent filed for review of the Board's decision and on March 18 the Board sought enforcement of the order. On May 28, Knapp notified Respondent in writing, that employees Todd Hayes and Kirk Wood would begin an unfair labor practice strike in protest of the Respondent continuing unfair labor practices. Previously, on March 14, a complaint was issued in the lead case here which allege that the Respondent had bypassed the Union, had unilaterally implemented a short term disability plan and made changes in health insurance benefits for employees; had engaged in direct dealing with employees over health insurance benefits; and had refused to provide relevant and necessary information to the Union. Also, on March 26, Respondent's attorney and lead negotiator (the Respondent's owner and

[1] All following dates will be in 1996 unless otherwise indicated.

president, John Huizinga, specifically avoided any personal involvement in negotiations), advised the Union that it was "unable to agree to any of the dates you proposed for bargaining" and suggested that because both the Union and Employer had filed new charges that neither side would "be able to conduct any open discussion" until after the Regional Director made a decision on the changes.

On May 29, the Respondent demanded in writing, that the Union supply it with, among other things, the "specific acts" claimed to constitute the basis for the strike by Hayes and Wood. It claimed a lack of awareness of any such basis, and further stated that unless it received an immediate reply to its questions it would consider the employees to have "quit" unless the strikers returned to work "immediately." The very same day, Knapp sent, by facsimile transmission, a response which stated the Union's reasons as:

> Allied Mechanical Services continuance to refuse to bargain in good faith and the other unfair labor practices set forth in the most recent National Labor Relations Board complaint are the reason for the unfair labor practice strike.
>
> Upon cessation of your continuance to refuse to bargain in good faith and to satisfy all remedies in the outstanding unfair labor practices the workers would be prepared to end their unfair labor practice strike.

On June 12, employees Ron Parlin and Jeff Warren joined Hayes and Wood on strike because of Respondent's continuing unfair labor practices, and, through the Union, advised Respondent of the commencement of their strike activity. Again, Respondent demanded further explanation of the reasons for the strike, the Union immediately provided it, and the Respondent deemed the employees to have quit their employment. That same day, without providing any opportunity for the strikers to immediately return, the Respondent also notified its insurance carrier that Parlin and Warren had quit their employment.

On June 26, the Regional Director issued an amended consolidated complaint in Cases 7–CA–38022, 7–CA–38204, and 7–CA–38440, in which he added an allegation that Respondent had refused to meet and bargain with the Union since March 26, the date of Respondent's letter refusing to schedule dates for negotiations. On July 1, employees Jeff Kiss and Mark Lemmer joined the other strikers. The same written communications from Respondent followed the Union's strike notice however, Respondent added that it did not consider the employees' articulated reasons for striking "adequate to meet the standards for legitimate protected concerted activity or the requirements for an unfair labor practice strike as defined by the law."

On September 16, the Union made an unconditional offer to return to work on behalf of the six strikers. The Respondent otherwise developed the record to show that neither the Union's offer nor the testimony of any strike identified any change that had occurred in terms or conditions of employment or the Respondent's bargaining position or in negotiation concessions that triggered or caused the offer to return. The Respondent did not reinstate the six employees. Thereafter on December 23, employees Jon Kinney and Tobin Rees also went on strike and were joined by Joel Kinney shortly after he was recalled from a lay off.

In September 1996, brothers Joel and Jon Kinney, who were both apprentice pipefitters, had been laid off when work slowed down on the jobsite they had been working on. Joel was laid off for a month, and Jon was laid off for 3 months. They had worked for the Respondent since 1993, and this was the first time that either of them had been laid off. In the past when work slowed down, the Respondent had found other work for them to do or notified the Union about layoffs or given the Union an opportunity to bargain about the layoffs. Similarly, the hours of Tobin Rees, also another apprentice pipefitter, were reduced by 1 day a week in September 1996 for several weeks. The Respondent did not notify the Union or give it the opportunity to bargain about either of these actions.

The General Counsel presented evidence showing that beginning in July 1995, and continuing through the fall of 1996, the Union submitted a series of information requests to the Respondent. Although the requests generally were ignored, in a few instances the Respondent provided information but did not do so until long after it had been requested. During the same period, the Respondent made unilateral changes in working conditions by implementing a disability insurance coverage plan and by implementing substantial changes in its health insurance coverage without giving the Union notice or an opportunity to bargain. The record also was developed to show that the Union and the Respondent had three bargaining sessions during the fall of 1995, that the Respondent did not provide the Union with necessary and relevant bargaining information, and that the Respondent made the unilateral changes discussed above even though they still were engaged in negotiations. The Union thereafter filed new or amended charges on January 9, February 26, and March 6, 1996, and, on March 19, the Union exchanged correspondence concerning further negotiation. As noted above on March 26, Respondent's counsel replied that he was unable to agree to any dates and asserted an unwillingness to conduct discussions while the new charges were pending.

On March 29, the Union sent another letter to Respondent's counsel and advised him that the suggested dates of April 9 and 10 and May 2, were still available and requested that he reply by April 1 so the appropriate arrangements could be made. Respondent's counsel did not respond. In an April 3 letter, Union Business Manager Bob Williams responded to Respondent's counsel's letter of March 26 and asserted that the pending unfair labor practice charges provided no impediment to having "fruitful, productive negotiations." Further, he objected to counsel's demand that they bargain by mail and insisted that they meet at the bargaining table and engage in face-to-face negotiations. He added, "If you would provide us with the economic information that we have requested, as the Board has recently found you [are] legally obligated to do, it would greatly assist us in formulating our economic proposals." He requested additional bargaining dates, and requested that counsel contact him in the near future. The Respondent neither responded to this letter, nor did it come to the bargaining table as requested.

Additional pertinent testimony and my factual findings based on the credible evidence will be set forth in more detail in the

following specific discussion of the several allegations and issues involved.

III. DISCUSSION

These proceedings arose during a period of unfruitful collective-bargaining attempts between the Respondent and the Union after the Union had been the certified as bargaining representative for the Respondent's plumber/pipefitter employees in July 1991. Conflicts occurred in 1992 and 1993, which resulted in complaints and the proceeding I heard in 1994. The Respondent resisted compliance with a remedial order of the Board issued in December 1995, until that decision was enforced by a court of appeals in July 1997. The Respondent, as found below, also delayed and resisted bargaining with the Union and followed its own, selective interpretation of labor law in various actions which include failing to timely provide information request by the Union and implementing unilateral changes in working conditions and terms of employment. Not surprisingly, the Union did not relinquish its role as bargaining representative but availed itself of its fundamental rights under Section 7 of the Act and chose to engage in strike activities. The Respondent resisted making any response through the bargaining process and proceeded to announce that it considered that the striking employees had "quit." It thereafter refused to reinstate striking employees who thereafter made an unconditional offer to return to work.

A. The Strike

The Respondent contends that the walkouts by the six "strikers" do not rise to the level of protected concerted activity under the Act citing *NLRB v. Leslie Metal Arts Co*., 509 F.2d 811, 813 (6th Cir. 1975), and *Vemco, Inc. v. NLRB*, 79 F.3d 526, 530 (6th Cir. 1996), in which the Sixth Circuit Court of Appeals applied a four-part test which set forth the central elements of protected concerted activity under Section 7:

> (1) There must be a work-related complaint or grievance; (2) the concerted activities must further some group interest; (3) a specific remedy must be sought through such activity; and (4) the activity should not be unlawful or otherwise improper.

The Respondent also makes much of the facts that some individual strikers could not identity a particular event that triggered the timing of their individual participation in the strike and that when the strikers offered to return to work, there had been no change in the Employer's position on any issue at stake in negotiations. It further contends that the Union's notice failed to explain why the employees had gone on "strike," why they had decided to end their "strike," what goals the "strike" had achieved or what had prompted their return.

The Respondent also contends that the strikers engaged in unprotected "mini-strikes," that the strikers were "salts" who, as paid union organizers had a conflict of interest that precluded their free choice in their decision to strike that they engaged in economic collision on behalf of the Union and that the strike was not a bona fide unfair labor practice strike.

The Respondent repeatedly characterized the striking employees as "salts" and in its brief quotes a definition of "salting" as the practice of having "union members or organizers take jobs with open shop contractors to organize workers or to harass or disrupt contractor operations" citing *NLRB v. Fluor Daniel, Inc.,* 102 F.2d 818 (6th Cir. 1996), which in turn quotes Herbert R. Northrup, "*Salting" The Contractor's Labor Force: Construction Unions Organizing With NLRB Assistance*," 14 H, Kav. Res. 469, 471 (1993). As recognized in the prior *Allied Mechanical* case, supra, the Union's "salts" are employees entitled to protection under the Act. See also the decision of the Supreme Court on this issue in *NLRB v. Town & Country Electric*, 516 U.S. 85 (1995).

The issue of "salting," as in the *Fluor Daniel* case, usually has arisen in so-called "refusal-to-hire" cases. In the instant case, however, we have a situation where the Employer is not a clear open shop contractor inasmuch as the Union is, and had been since 1991, the certified bargaining representative of the Respondent's plumbing and pipefitter employees and the alleged discriminatees are not job applicants but workers who have been regularly employed by the Employer, generally for a number of years.

The court of appeals, in its May 1997 decision in *Allied Mechanical,* supra, addresses some of the same basis issues presented in the Respondent's argument noted above, however, it specifically found that it lacked jurisdiction to consider the issues of "the strikers' Intermittent Work Stoppages" and "The Union's Role in Coercing the Strike." Thus, in its development of this record, the Respondent pursued an attempt to impugn the Union's and the employees' motivation and role concerning the strike and, on brief, it argues that employees Hayes and Kiss admitted they were not on an unfair labor practice strike. It also contends that the walkouts were unprotected because the employees did not exercise free choice in the decision to strike as they were under the direction and control of the union.

The Respondent points out that when Owner Huizinga personally asked Hayes and Kiss why they had gone on strike and what it would take to return to work, their only response was directed at the desire to receive a higher, union wage rate. Under the circumstance here, however, this response does not act to reduce the status of the strike to being solely an economic strike, as urged by the Respondent. First, it is noted that the subject of wages was part of the contractual bargaining ongoing between the Union and the Respondent (and not a proper subject for direct dealing between the owner and individual employees). Second, the Union's explanatory letters to Huizinga (as further discussed below), specifically referred to a "continuance to refuse to bargain in good faith" as well as the unfair labor practices alleged in pending complaints.

Here, the Union, as the bargaining agent for the employees is the initial and proper party for communications affected the rights of the employees. The Union communicated a valid unfair labor practice related reason for the strike to the Employer and the individual's concerns with wages clearly relate to the ongoing but clearly frustrated contract negotiators. Otherwise, it is clear that regardless of the existence of some individual economic motivation, a strike caused even in part by an employer's unfair labor practices is an unfair labor practice strike, see the courts earlier decision in *Allied Mechanical,* supra at 626 and 627, which also specifically notes that the employees' strikes in 1992 and 1993 (found to be valid strikes),

were related to (among other reasons), this same Respondent's failure to negotiate a contract with the Union.

Turning to the Union "control" issue, it is apparent that the Union, as the collective-bargaining representative of the plumbing and pipefitter employees, has the status, the right and the obligation to pursue strategies and actions that it perceives to be in the interest of those it represents. The fact that some employees were members of the Union also chose to accept some minimal compensation (in the nature of supplement to their regular hourly wage from the Employer that would tend to equate with the nominal union wage level), for the apparent risk they took in maintaining their active support for the union does not create some adversarial conflict of interest situation as claimed by the Respondent. Here, the Respondent otherwise offers mere speculation (such as implications that the Union was somehow acting as an agent of or in conspiracy with other contractors who have collective-bargaining agreements with the Union or conjectures that the Union was seeking to drive the company out of business), that fails to present any type of conflict of interest outlawed by the Act, see the discussion in *Montank Bus Co.*, 324 NLRB 1128, 1137–1138 (1997).

The law otherwise permits a union to make nonmalicious, noncoercive efforts to put pressure on a company to accede to a union's bargaining demands or to protest unfair labor practices, see *Burns Security* Services, 324 NLRB 485 (1997), and here the Respondent shows no extraordinary circumstance that would act to disqualify the Union from its role as bargaining representation or act to rationalize the Respondent's apparent position that it is free to avoid good faith bargaining and adherence to the labor laws because of its apprehensions, suspicions and speculation about the motives of the Union. The Union has the right to attempt to maintain or enhance its employee membership status during the period after recognition or certification, a period when collective bargaining should be occurring. Accordingly, the strikers nominal position as supplemental payment "salts" does not affect their status as statutory employees and it does not deprive them or the union section under the Act, compare *M. J. Mechanical Services*, 324 NLRB 812 (1997).

Here, the Union and its members were engaged in a strike that was related to alleged unfair labor practices (specific labor practice charges had been filed and served on the Respondent on January 9, February 26, March 12, and April 30, and an amended consolidated complaint issued on May 22), as well as to the failure of the employer to negotiate a contract. These reasons were communicated to the respondent in a generalized format that reasonably conveys the Union's reasons and purpose and I find that the Union's actions are adequate to satisfy any Union obligation in this regard. Otherwise, an employer is not free to demand additional explanations nor is it free to take the completely obtuse position that it doesn't know what the strike is all about or what can be done about it and thereby excuse itself from the legal obligations which flow from its subsequent actions which affect the employee who engage in a strike, see *Eaton Warehouse Co.,* 297 NLRB 958, 961 (1990), enf. 919 F.2d 141 (6th Cir. 1990).

Here, the individual strikers were long-term employees of the Respondent who had a free choice to continue to work at their regular rate of pay or to participate in the Union's strike strategy. The actual timing of the first strike and the supplement enlargements of the strike were discussed at union meetings. It is not material that the precise date may have been picked by the union representative, as it was freely endorsed and agreed to by those who joined the strike (although some questions were asked by Respondent's counsel relating to union procedural strike authorization requirements, that direct issues is an internal union matter and is not pertinent to any finding in this proceeding). The fact that the employees may have collectively depended on the Union's experience and advice before choosing to join the strike hardly approaches any level of domination and control or conflict of interest that could be considered to invalidate their status as striking employees entitled to the protections recognized by the Act and the Board's decisions.

The strike in these proceedings began some 3 years after the strike involved in the prior *Allied Mechanical* case, supra, and it involved different employees. The mere fact that employees had engaged in a prior strike does not make additional strikes unprotected. See *United States Service Industries,* 315 NLRB 285 (1994). I also find that the strike in the instant case is in the nature of a single strike that began on May 28 with two employees and was expanded when the first two employees were joined by two more strikers on June 12 and two more on July 1, and that it is not a situation which portrays a series a unprotected ministrikes. The Respondent's speculation in this regard does not provide persuasive evidence that the Union engaged in hit and run strikes as part of a planned strategy intended to harass the Company into a state of confusion, see *Pacific Telephone & Telegraph Co.*, 107 NLRB 1547 (1954). Here, the Union and individual strikers express valid, protected reason for the strike activity in 1996. The fact that the Respondent may have been annoyed by the Union's initial strike by two employees (a number of strikers that hardly would seem designed to have a significant adverse affect on the Company), does not rise to the level of an unprotected work stoppage, especially when this seemingly minor event is met by the Employer with a provocative response in which it threatens to fire the striker unless they immediately return to work, an action that I otherwise find to be a violation of Section 8(a)(1) of the Act. The strikers were not obligated to accede to the Respondent's threat and it is not surprising that the Union met the Respondent's challenge by thereafter increasing the number of strikers participating in the work stoppage.

Here, the Union and the strikers engaged in a permissible form of resistance to the Employer's perceived commission of unfair labor practices and failure to bargain by striking in a calculated attempt to initiate some reconsideration by the Employer of its apparent and continued failure to truly recognize that the certified Union is the collective-bargaining representative of its unit employees.

As pointed out by the General Counsel the fact these employees went out on strike without presenting the Employer with more specific demand does not render the strike unprotected. *NLRB v. Washington Aluminum Co.*, 370 U.S. 9 (1962). Moreover, there is no requirement that a union or individual strikers cannot choose to end the strike unless they successfully

achieve some resolution of a particular demand or desired change in the respondent conduct. The decision to strike or to join in a strike as well as the decision to end a strike and make an unconditional offer to return to work can be made for a good or wise reason or for a bad reason or unwise judgment. As long as no clearly illegal reasons are involved, motive and success are irrelevant. Accordingly, the apparent lack of success at the point of time when an unconditional offer to return to work was made does not preclude the Union from pursuing another strategy and it does not imply anything that would render the strike itself, unprotected.

Here, I find that the activities in which the Union and the striking employees were engaged constituted protected activity, and that nothing in the record would persuasively support the claims by the Respondent to the contrary. I also find that the strike was called to protect unfair labor practices and that the strike was an unfair labor practice strike from its inception with the strikers thereby holding status as unfair labor practice strikers.

Under these circumstances, the Respondent was not at liberty to threaten to terminate or to terminate any of its striking employees because they failed to "immediately" return to work in response to the owner's letters. As unfair labor practice strikers, they could not lawfully be discharged, or threatened with discharge or other disciplinary action, other than for misconduct causing them to lose the protection of the Act. The six strikers also were entitled to reinstatement on making an unconditional offer to return to work and their reinstatement rights were paramount over any replacements hired for them during the strike, see *Chesapeake Plywood*, 294 NLRB 201, 202 (1989).

B. Refusal to Reinstate and Termination of Strikers

Here, as in the prior *Allied Mechanical* case, supra, the Respondent's termination and refusal of reinstatement is based in large part on its unjustified assertion that the strikers were paid professional organizer and "salts." Although it by now should be well aware of the Supreme Courts *Town & Country* ruling, supra, the Respondent engages in repeated disparagement of the strikers as unloyal "salts" under the domination of the Union and I find that this specifically demonstrates that its refusal to reinstate the strikers was motivated by antiunion animus. I find a further display of animus in the Respondent's letters to the Union when each group of employees joined the strike which threatened that unless they returned to work immediately they would be considered to have quit their employment. The Respondent at the same time notified the company managing its insurance coverage that these employees had quit their employment and it thereby executed its threat of termination, an action I otherwise find to be in violation of Section 8(a)(1) and (3) of the Act. Other clear indications of animus are shown by the owner's personal involvement in baring union representatives from attending a meeting about changes in benefits, as discussed below, and accordingly, I find that the General Counsel has met his initial burden by presenting evidence, sufficient to support a strong inference that the employees' union and concerted activities were a motivating factor in Respondent's decision to terminate and to deny them reinstatement. Accordingly, the testimony will be discussed and the record evaluated in keeping with the criteria set forth in *Wright Line,* 251 NLRB 1083 (1980), see *NLRB v. Transportation Management Corp.,* 462 U.S. 393 (1983).

Under both the *Wright Line* and *Laidlaw* test the burden of proving justification for a failure to recall is on the employer. Here, it is clear that the Respondent has failed to meet that burden.

Here, the Respondent essentially relies on its attack on the validity of the strike and it does not assert any substantial business justification for its refusal to reinstate the striking employees or contend that their respective unconditional offers to return are defective. Clearly, an employer who refuses to reinstate striking employees on their unconditional offer to return to work, violates Section 8(a)(3) and (1) of the Act, where "legitimate and substantial business justification" are not shown, *NLRB v. Fleetwood Trailer Co.,* 389 U.S. 375, 379 (1967). It also is clear that the Respondent has not shown that the six strikers would have been terminated for not immediately returning to work even in the absence of their protected, concerted strike activity and, under the circumstances, I find that the Respondent is shown to have violated Section 8(a)(1) and (3) of the Act in regard to both the refusal to recall, the threat to terminate, and the termination of the strikers, as alleged.

C. The Respondent's Unilateral Actions

On September 1, 1995, Respondent implemented a new short-term disability plan for its employees. It notified the employees of this change but admittedly never bothered to notify the Union or give it an opportunity to bargain. The Respondent contends that the change was beneficial to the employees, however, whether the change was good, bad, or indifferent does not affect Respondent's duty to bargain before implementing the change, see *Randolph Children's Home*, 309 NLRB 341, 343 fn. 3 (1992). I find that the disability insurance plan was a mandatory subject of bargaining, and by implementing it unilaterally without giving the Union notice or opportunity to bargain, the Respondent violated Section 8(a)(1) and (5) of the Act, as alleged, see also *Enertech Electrical Inc.*, 309 NLRB 897, 898 (1992).

At a bargaining session held on November 22, 1995, Respondent's counsel advised the Union that it planned to implement changes to its health insurance plans effective January 1, 1996. Knapp, the Union's chief negotiator, requested copies of the proposed changes to the insurance plan, and requested that the Respondent bargain about them before implementing the changes. The information was not provided to the Union. The Respondent decided to adopt the proposed changes without negotiating about them and instead dealt directly with the bargaining unit employees, when on December 5, 1995, Owner Huizinga issued a memo to employees advising them that a meeting would be held on December 12 to discuss the proposed changes in the health insurance plan. On learning of the memo, union organizer Knapp faxed a letter on December 12 demanding that the Respondent negotiate the proposed benefit changes with the Union, and he renewed the Union's previous requests for a copy of the proposed changes and for the employees' annual evaluations. The letter also stated, "As a result of this

failure to communicate and negotiate these matters, we feel that we must attend the scheduled meeting." The Respondent did not provide the requested information or agree to meet and negotiate the changes prior to their implementation. Moreover, Huizinga immediately faxed a response which indicated that Knapp did not have a right to attend and was not invited to the meeting that afternoon and that the meeting was to be only for employees.

Knapp and Local 335 Business Manager Richard Franz (a member of Local 337's bargaining team) went to the hotel where the employee benefit meeting was to be held. They were stopped at the door of the meeting room by Huizinga and asked what they were doing there. They said that they were attending the meeting as bargaining representatives of the employees and Huizinga replied that they were not welcome and that he had made arrangements to have them taken out if any trouble started. Franz told him that if changes were going to be made in the health and welfare benefits, they could not be made without first bargaining those changes with the Union. Huizinga responded that they were not on his payroll and he did not want to hear any of their "shit," and told them that he would have them removed. The union representatives reminded him that the proposed changes were issues for bargaining, and that they were entitled to be there to hear the proposed changes. Huizinga then sent someone to the front desk, a hotel representative came and asked the union representatives to leave and they agreed that they would. Franz gave credible testimony that Huizinga, who was in view of his employees who were waiting for the meeting to start, pushed Franz out of the way and closed the door. Huizinga did not offer to give these union representatives copies of the enrollment forms or other information concerning the proposed changes, however, employees were given summary plan descriptions about the proposed changes and insurance company representatives were there to answer their questions about the new plan. The changes in the health and welfare plan included a charge from an HMO to a plan where employees selected individual doctors, coverage levels were also changed. The employees were offered a new medical savings plan and I find that changes to the insurance plan were a mandatory subject of bargaining. I conclude that by bypassing the Union and dealing directly with the unit employees with respect to these changes, and by failing to give the Union notice and opportunity to bargain, the Respondent has violated Section 8(a)(1) and (5) of the Act, as alleged. See *Coastal Derby Refinery Co.*, 312 NLRB 495, 497 (1993).

On July 26, Owner Huizinga met with bargaining unit employees and conducted employee evaluations. After reviewing the employee's work performance in a number of areas—work habits, punctuality, appearance, trade knowledge, and attitude—he rated them from 1 to 5 in these areas, and gave them an average overall rating. He also decided on whether or not to give an employee a merit raise. Whether an employee received a merit raise and the amount of the merit raise was at his own discretion and was not dependent on employee's average rating or based on a schedule of raises or wage increases for which an employee is eligible and higher rated employees could get lower raises than less well rated employees. Huizinga also testified that in some cases he makes discretionary cost-of-living wage adjustments but that there is no formal cost-of-living wage increase procedure or schedule and there are no regularly scheduled cost-of-living adjustments. After an employee received an evaluation with his raise, he was allowed to request to meet individually with Huizinga and to negotiate directly with him for a higher raise.

The Respondent gave these raises without giving the Union notice and opportunity to bargain and on August 2, union organizer Knapp sent Huizinga a letter in which he reminded him that he had failed to provide the Union with necessary information, and that he had unilaterally altered compensation and benefits and specifically wrote:

> We have been acquainted with a few of the increases, all of which have never been communicated to this local union, if spite of our frequent requests and our corresponding assertions that we need the wage and evaluation data in order that we may calculate and present a realistic economic proposal for your consideration. The wage increases with which we have third party familiarity are woefully inadequate.

Knapp also requested copies of the evaluations and changes that had been made to the compensation packages but the Respondent failed to respond to this request.

The Respondent asserts that because it used the same system to evaluate employees and consider employees for merit raises in 1995, it was an established condition of employment that did not change. In *Oneita Knitting Mills*, 205 NLRB 500 fn. 1 (1973), the Board stated that:

> An employer with a past history of a merit increase program neither may discontinue that program. . . nor may be any longer continue to unilaterally exercise his discretion with respect to such increases, once an exclusive bargaining agent is selected. . . . What is required is a maintenance of the preexisting practices, i.e., the general outline of the program, however the implementation of the program (to the extent that that discretion has been exercised in determining the amounts or the timing of the increases), becomes a matter as to which the bargaining agent is entitled to be consulted. [Citations omitted.]

Here, the Respondent had a duty to bargain about the amount of the raises that employees were to receive or were eligible to receive. See, *Bituminous Roadways of Colorado*, 314 NLRB 1010, 1012–1014 (1994); and by implementing these discretionary increases without giving the Union notice and opportunity to bargain, the Respondent violated Section 8(a)(1) and (5) of the Act, as alleged. Also, the information which the Union requested in its August 2 letter was preemptively relevant and by failing to provide it the Respondent committed a separate violation of Section 8(a)(1) and (5) of the Act, see the information discussion below.

Striking employees Hayes, Kiss, Lemmer, Parlin, Warren, and Wood were not given evaluations during the summer of 1996, along with the other employees, because Respondent contended that they had quit their employment by going on strike. By letter dated October 3, the Union demanded that they be furnished copies of their evaluations and also be allowed to review the evaluations of Joel and Jon Kinney and Tobin Rees.

Respondent did not respond to the letter but argues that since 1993 it has consistently followed a procedure whereby it allowed a "brief period" for employees to request a personal meeting with the owner, that evaluation related meetings are not allowed thereafter and that the latter three employees sought meetings several weeks after the review period expired. The Respondent also states that the other employees were not evaluated simply because they were not working at the time the evaluations were conducted.

Under these circumstances, I am not persuaded that the record is sufficient to show any independent violation of the Act in regard to the failure to conduct evaluations and, accordingly, I find that the allegation is unproven and that this portion of the complaint should be dismissed. The related failure to provide information allegation, however, is valid and will be discussed in the following section of this decision.

In September, 1996, Joel and Jon Kinney, who were both apprentice pipefitters, were laid off when work slowed down on the jobsite they had been working on. Joel was laid off for a month, and Jon was laid off for about 3 months. They had worked for the Company since 1993, and this was the first time that either of them had been laid off. In the past when work slowed down, the Respondent had found other work for them to do. The Employer did not notify the Union about their layoffs or give the Union an opportunity to bargain about the layoffs. The hours of Tobin Rees, also an apprentice pipefitter, were reduced by a day a week in September 1996 for several weeks and the Respondent did not notify the Union or give it the opportunity to bargain about this reduction of hours. The Respondent argues that these brief layoff periods did not involve permanent schedule changes and were simply a short-term response to slow business conditions inasmuch as the projects to which the Kinneys were assigned were nearing completion and there assertedly were no other projects to which they could be reassigned. I find that they and other employees were temporarily laid off pursuant to company policy.

The Respondent shows that it has laid off similarly situated employees on various other occasions during periods of slow work and that the Company's layoff policy is an existing term and condition of employment because it was in effect before the Union was certified and recognized. I find that it persuasively argues that such day-to-day decisions which are consistent with an existing term of employment derived from past practice or its employee handbook are not subject to a bargaining obligation. See *Queen of the Valley Hospital,* 316 NLRB 72 (1995).

The record otherwise shows that the Respondent recalled Jon Kinney from layoff in December 1996, while Joel Kinney was recalled briefly in October and again "a month or more" later and there is no showing that they were discriminatorily selected for layoff because of antiunion animus. The Respondent also shows that Rees was sent home for a total of 3 days over a 3-week period due to bad weather and construction delays. Rees testified that he was unable to work because his crew was held up while waiting for other contractors to finish certain tasks and that no one on Rees' crew at that jobsite worked on these few days. Under these circumstances, I find that the General Counsel has failed to show that the Respondent's actions were inconsistent with established practices and its handbook policy or otherwise were violative of the Act and, accordingly, the allegations relative to these matters will be dismissed.

At the beginning of September 1996, Respondent changed its apprenticeship classes from Kellogg Community College, where employees were allowed to attend classes at their own pace, to a classroom at its places of business. It admittedly did not give the Union notice and opportunity to bargain. It issued employees a memorandum which described the new apprenticeship program, and advised employees that the program would not be the same as Kellogg Community College. Unlike the Kellogg Community College program which allowed students to attend the apprenticeship classes on days and times of their own choosing, the new program was structured as a regular class held the same day each week. The memorandum also provided, "There will be strict rules on missing classes," and the Respondent issued a new attendance policy with the memorandum. Attendance at the Kellogg program had not been strictly enforced. For example, Joel Kinney, testified that he had missed class once a month the previous year and he had not been removed from the program. Under the new program, employees were told that if they missed three classes they would be dismissed. Huizinga admitted that participation in its apprenticeship program was a condition of employment and, under the circumstances, I find that the implementation of the new apprenticeship program, along with the new attendance rules for that program, was a mandatory subject of bargaining. The Respondent's respected claim that the changes made to the apprenticeship program were beneficial to employees is no defense, see *Randolph Children's Home*, supra, and I further conclude that by implementing this change without giving the Union notice and opportunity to bargain, the Respondent violated Section 8(a)(1) and (5) of the Act as alleged, see *E.G. & G. Rocky Flats*, 314 NLRB 489, 493–499 (1994).

D. Refusal to Provide Information

In July 1995, Respondent conducted annual reviews of the bargaining unit employees. Under this review process, employees were given merit raises. Upon learning of these reviews the Union, by letter dated July 19, 1995, requested that the Respondent provide it with copies of the completed reviews within 10 days of the receipt of the letter. Negotiations were ongoing at this time, however, the Respondent did not respond. The Union again requested the employee evaluations at a negotiating session held on October 24 and November 9 and 22, 1995, but the Respondent did not respond to these requests.

It is the employer's burden to establish that the information the union is seeking is confidential. *Detroit Newspaper Agency*, 317 NLRB 1071, 1072 (1995), and, if an employer had confidentiality concerns about the information it was being asked to provide the Union, it can not simply not provide it, but is obligated to timely raise its confidentiality concerns and attempt to negotiate an accommodation with the Union. This was not done. Also the fact that they had once provided wage information did not relieve it of the obligation to provide it in the future (this information was not clearly duplicative, because employees received discretionary wage changes). The Respondent also raises the implication that the Union was disclosing

wage information to the Respondent's union shop competitors and speculates that it was an attempt to give them a bidding advantage over the Respondent, however, the fact that competitors by one means or another may have been able to estimate the Respondent's labor cost and to consider this in preparing their own contract bids fails to independently demonstrate that the Union was responsible or should lose its rights to the information or that it would violate any requested confidentiality agreement.

Here, I find that employee evaluations which might indicate the raises that employees were to receive are wage data and are presumptively relevant and by not providing this information, as well as subsequently not providing similar information request in connection with the 1996 evaluations and related wage data (noted in connection with the discussion of unilateral changes), the Respondent violated its duty to bargain under Section 8(a)(1) and (5) of the Act. See *Capitol Steel & Iron Co.*, 317 NLRB 809, 812–814 (1995).

Jeff Kiss was exposed to toxic fumes when cutting into a pipe line on the Respondent's jobsite. By letter dated January 30, 1996, organizer Knapp requested a copy of Kiss' December 1995 accident report, and a copy of the material data safety sheets of the chemicals involved in the accident. The Union needed this information to represent Kiss as a bargaining unit employee and to represent other employees who may be exposed to similar chemical spills in the course of their job. Health and safety of employees are terms and conditions of employment about which an employer is obligated to bargain. *American National Can Co.,* 293 NLRB 901, 904 (1989), and such safety information is relevant to the Union's duty as collective-bargaining agent of these employees. The Respondent did not provide the accident report or the material data safety sheet until at least April 15, 1996.[2] This information was apparently readily obtainable, however the Respondent contends that it did not provide the information to the Union in a more timely manner because it did not receive written authorization from the affected employee to disclose the information to the Union until sometime around the beginning of April. As noted, the burden is on the Respondent to establish the need for confidentiality of this information or to promptly request to negotiate with the Union with respect to its confidentiality concerns.

By letter dated February 2, 1996, Knapp requested a copy of an accident report for Todd Hayes, who was involved in a jobsite accident where he slipped and twisted his knee, Respondent did not provide a copy of this report until April 15. In the same vein, in a letter dated May 17, the Union requested that the Respondent provide it with a copy of its "hazard communication" program and a list of hazardous chemicals that employees may be exposed to while working on jobsites for the Respondent. By letter dated May 20, Knapp requested the Respondent emergency action plan, and by letter dated May 21, he requested a copy of the service log and a list of all the Respondent's recorded injuries and illnesses for the past 5 years. On October 10, Knapp sent Huizinga a letter requesting information about the new apprenticeship program, including the names of the employees currently enrolled, and at what locations, as well as copies of the apprenticeship and training requirements of the apprenticeship classes. The Respondent did not respond to these requests and, I find that its failure in this regard are a violation of Section 8(a)(1) and (5) of the Act, as alleged. See *JRED Enterprises,* 313 NLRB 1244 (1994).

By letter dated November 14, 1996, Knapp made another information request for the names, addresses, classifications, hired date, and pay rates for all bargaining unit employees and the hire, layoff, and recall procedures for these employees. He also requested the hire dates of temporary high school employees, along with their names, duties, job descriptions, work hours, layoff/hire procedures, hire dates and names, and addresses. Respondent did not provide any of this information except that sometime in or about December 1996, it provided wage rate data but did not indicate which employees received what wage rates.

Here, I find that the information described above was clearly relevant to the Union's duty to represent bargaining unit members, including concern for safety on the job and what precautions the Union would want the Respondent to take to protect its employees. The Respondent did not respond directly to requests. The Union did file a complaint with the appropriate agency in the State of Michigan that required safety information to be kept, but the Union did not receive any of the information until it received it from the State agency in late summer 1996. The fact that a union may have an alternative means of obtaining the information does not absolve an employer of its duty to provide requested relevant information in a timely manner. See *Detroit Newspaper Agency*, supra. Moreover, the Respondent's duty to provide the information arises under Section 8(a)(1) and (5) of the Act and as the Board held in *Kroger Co.,* 226 NLRB 512, 513 (1976):

> Absent special circumstances, a union's right to the information is not defeated merely because the union may acquire the information through an independent source of investigation. The Union is under no obligation to utilize a burdensome procedure of obtaining desired information requested by the Union where the employer may have the information in a more convenient form. The union is entitled to an authoritative statement of facts which only the employer is in a position to make. It is thus clear where a request adequately informs the employer of the data needed, the employer neither must supply the information or adequately set forth the reasons why it is unable to comply. [Footnotes and citations omitted.]

Accordingly, I find that the Respondent's overall failure to provide and delays in providing information violated Section 8(a)(1) and (5) of the Act, as alleged.

E. Refusal to Bargain

The Union and Respondent had three bargaining sessions during the fall of 1995. As noted above, the Respondent failed to provide the Union with necessary and relevant information, and it made unilateral changes, discussed above, which resulted

[2] The Region dismissed the portion of the charge in Case 7–CA–38204 concerning the refusal to provide the accident report and the material data safety sheet, but did not dismiss the allegations concerning Respondent's excessive delay.

in the filing of unfair labor practice charges by the Union on January 9 and 30, February 26, and March 6, 1996.

On March 19, the Union sent Respondent's counsel a letter requesting dates to continue further negotiations, and suggesting seven possible dates in April and May. On March 26, Respondent's counsel replied by letter and indicated that he was unable to agree to any of the proposed dates for bargaining. He went on to mention pending charges and stated his belief "that neither (party) will be able to conduct any open negotiations." He added that if the Union submitted a comprehensive proposal, "AMS would be in a position to consider to your proposal," but he did not say that the Respondent would be willing to meet and bargain or that the Respondent was unavailable on the seven dates proposed by the Union.

On March 29, the Union sent another letter to Respondent's counsel stating that the suggested dates of April 9 and 10 and May 2, 1996, were still available and requested that the Respondent reply by April 1 so the appropriate arrangements could be made. Respondent's counsel did not respond. By letter dated April 3, the Union responded to Respondent's counsel's letter of March 26 and asserted that the pending unfair labor practices provided no impediment to having productive negotiations. The Union asked that they meet at the bargaining table and engage in face-to-face negotiations and added, "If you would provide us with the economic information that we have requested, as the Board has recently found you [are] legally obligated to do, it would greatly assist us in formulating our requested additional bargaining dates" renewed its information request and requested that counsel contact him in the near future. The Respondent never responded to this letter.

The complaint alleges that Owner Huizinga told the Union that it had no intention of ever executing a contract with the Union. The record shows that on about November 1, 1995, Douglas Lemmer, the Union's financial secretary, called Huizinga and asked him to have lunch with himself and business manager Williams. Lemmer had previously worked with Huizinga in the past and had a friendly but not "real personal" relationship with him. The Respondent had been a signatory of the Union master agreement prior to 1990 and Lemmer said "the purpose of the lunch was to try to tell him that the leadership had changed in the local and that if there had been some bad feelings with his predecessor that those would be gone and to encourage John to come back into the union fold." Lemmer told Huizinga that he thought Huizinga would get along better with Williams than the previous business manager. Lemmer testified that Huizinga replied that "he didn't think it would be a wise idea," because he was happy being an open shop and that "he had no intentions of being affiliated with the union whatsoever." The Respondent's counsel questioned Lemmer about his affidavit which contained a reference to the event and stated: "He said that he was happy operating as an open shop and he had no intentions of signing up with a union."

In response to my questions from the bench Lemmer credibly answered that he had not used the words "master agreement" or "contract" or "negotiations" during the conversation. I otherwise credit his testimony that his purpose for the invitation was not to ask Huizinga to sign the master agreement and that he did not refer to it during the conversation. He reiterated that the purpose was a "just to get to know one another again" and I find that this answer lends credibility to his recall of the actual conversation.

Huizinga recalled a conversation with Lemmer on about November 6 and asserts that he said he wasn't interested in talking to Williams "off the record" and that any contact and conversation should take place at the bargaining table. Respondent's Counsel asked Huizinga: "Did you tell Mr. Lemmer that you would not sign a union contract under any circumstances? and Huizinga answered "I absolutely did not."

On brief the Respondent attempts to claim that Huizinga merely declined to execute the Union's master agreement, however, Huizinga's own testimony makes no reference to anything he might have said to this effect and even his reference to contact at the bargaining table rings hollow inasmuch he admitted he was not "actually" serving on the bargaining team.

Here, I find that the Respondent's argument merely reflects what Huizinga retroactively believed he was thinking, not what he said to Lemmer. I conclude that Lemmer's testimony accurately reflects what was actually said and, accordingly, I conclude that the statement conveys the connection that the Respondent had no intention of reaching a bargaining agreement with the Union. This conclusion is reinforced by the Respondent's conduct immediately after this conversation whom the Respondent made the decision that it "couldn't wait any longer" as it "wanted" to make changes in the health insurance plan and it proceeded to do so on December 12 by unilaterally making the changes in direct dealings with the employee (while Huizinga personally excluded Union representation from the meeting room, as discussed above).

The Board, in *Richhold Chemical, Inc.*, 288 NLRB 69 (1988), reviewed and endorsed the summary of legal principles set forth in *Atlanta Hilton & Tower*, 271 NLRB 1600 (1984). This decision held, in part:

> It is necessary to scrutinize an employer's overall conduct to determine whether it has bargained in good faith. "From the context of an employer's total conduct, it must be decided whether the employer is lawfully engaging in hard bargaining to achieve a contract that it considers desirable or is unlawfully endeavoring to frustrate the possibility of arriving at any agreement." A party is entitled to stand firm on a position if he reasonably believes that it is fair and proper or that he was [sic] sufficient bargaining strength to force the other party to agree. [Citation omitted.]
>
> Although an adamant insistence on a bargaining position (i.e., not signing a master agreement), is not of itself a refusal to bargain in good faith, *Neon Sign Corp. v. NLRB,* 602 F.2d 1203 (5th Cir. 1979), other conduct has been held to be indicative of a lack of good faith. Such conduct includes . . . delaying tactics, unilateral changes in mandatory subjects of bargaining, efforts to bypass the union, failure to designate an agent with sufficient bargaining authority, arbitrary scheduling of meetings, and, as here, non compliance with a union's request for information.

Under the sequence of events shown above the Respondent gained no privileged to suspend face-to-face negotiations because unfair labor practices were pending, see *Caride Staple Co.*, 313 NLRB 877, 890 (1994), or because it was awaiting a comprehensive economic proposal. This is especially true where, the employer had refused to provide the very information that the union needed to formulate an economic proposal, see *CJC Holdings,* 320 NLRB 1041, 1045 (1996). Accordingly, I find that the Respondent's conduct discussed above is shown to be independently violative of the Act, as alleged, and I further conclude that the Respondent's overall conduct demonstrates a failure to bargain in good faith, all in violation of Section 8(a)(1) and (5) of the Act.

E. Vacation Pay

In late April or early May 1997, eight alleged discriminatees submitted requests for any accrued 1997 vacation pay to which they were entitled based on hours worked in 1996. Since 1989, the Respondent has maintained a vacation pay policy in its employee handbook. According to the vacation policy, employees are only eligible for vacation pay if they work at least 1150 hours in the previous year. In addition, employees who terminate their employment with less than 2 weeks' notice are ineligible for any vacation pay accrued during the year of their resignation:

> Employees who terminate employment voluntarily with less than two (2) weeks' notice or who are discharged are not eligible for vacation benefits accrued during the terminating year.

Here, none of the eight individuals were considered to be entitled to vacation pay in 1997 because each either failed to work the minimum number of hours in 1996 to qualify for 1997 vacation pay or, as for Jon Kinney and Rees, left with less than 2 weeks' notice. The General Counsel produced testimony from former employee Paul Walraben who voluntarily quit in May 1997 with only 1 day's notice. Walraben testified that, despite the short notice, he was paid 35 hours' accrued vacation pay. The Respondent, however, established that the pay represented vacation pay for hours he worked in 1995, and which he was eligible to receive in 1996. (Walraben was eligible for the pay because he had accrued sufficient hours in 1995 and was on the payroll as of December 1, 1996.)

Under these circumstances, I find that although the basis for its action was founded on its illegal termination of six of the employees, the Respondent is shown to have applied a long standing policy in a nondiscriminatory manner. Although the six illegally terminated employees are entitled to a remedy, I find that no useful purpose would be served by finding a separate violation of the Act in this regard, as alleged in Case 7–CA–39872 consolidated with these proceedings at the hearing on September 15, 1997. Accordingly, this complaint will be dismissed. This dismissal, however, is without prejudice to the computation of backpay and benefits which follow from the other finding herein which would apply to the six discriminatees because of the reduction in their hours of work was because of their illegal termination and the failure to reinstate them after their unconditional offer to return to work. Accordingly, such matters are deferred to the compliance stage of these proceedings.

CONCLUSIONS OF LAW

1. Respondent Allied Mechanical Services, Inc. is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

2. The Union is a labor organization within the meaning of Section 2(5) of the Act.

3. Todd Hayes, Jeff Kiss, Mark Lemmer, Ron Parlin, Jeff Warren, and Kirk Wood made valid unconditional offers to return to work following their participation in a protected unfair labor practice strike.

4. By failing and refusing to reinstate the named employees on and after September 16, 1996, the Respondent has violated Section 8(a)(1) and (3) of the Act.

5. By notifying striking employees Todd Hayes and Kirk Wood, Ron Parlin and Jeff Warren, and Jeff Kiss and Mark Lemmer on May 28, June 12, and July 1, 1996, respectively, that they would be considered to have quit their employment, the Respondent has threatened and terminated these employees and engaged in unfair labor practices in violation of Section 8(a)(1) and (3) of the Act.

6. By unilaterally making changes in terms and conditions of employment that are mandatory subjects of bargaining after the certification of the Union as the collective representative of the unit employees, without notice to or bargaining the Union including: granting wage increases effective August 1996, implementing new disability insurance benefits and a new health insurance plan, and by making changes in its apprenticeship training program, Respondent has violated Section 8(a)(5) and (1) of the Act.

7. By refusing to timely furnish the Union with information requested and needed in the performance of its duties as exclusive collective-bargaining representative, the Respondent has failed to bargain collectively and has engaged in and is engaging in unfair labor practices in violation of Section 8(a)(5) and (1) of the Act.

8. By bypassing the Union and dealing directly with employees with regard to a new health insurance plan by meeting with employees and excluding union representatives, the Respondent violated Section 8(a)(5) and (1) of the Act.

9. By its overall conduct during negotiations and away from the bargaining table, including its owner's statement that it had no intention of ever executing a contract with the Union, its failure to provide the Union with requested information needed in the performance of its duties as exclusive collective-bargaining representative, its unilateral implementation of changes in terms and conditions of employment, its failure to bargain about changes that are mandatory subjects of bargaining, its failure to respond to communications, its failure to agree to dates for bargaining, and its refusal to meet with the Union during the pendency of unfair labor practice charges, the Respondent has failed to bargain in good faith in violation of Section 8(a)(5) and (1) of the Act.

10. The Respondent otherwise is not shown to have engaged in conduct violative of the Act as alleged in the complaint.

REMEDY

Having found that the Respondent has engaged in certain unfair labor practices, I find it necessary to order it to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act.

Inasmuch as Respondent illegally terminated Todd Hayes, Jeff Kiss, Mark Lemmer, Ron Parlin, Jeff Warren, and Kirk Wood at the times they went out on strike and otherwise failed and refused to offer timely recall on and after September 16, 1996, when they made valid offers to return to work, it is recommended that Respondent must offer them reinstatement to their former jobs or substantially equivalent positions, dismissing, if necessary, any employees hired subsequent to the date of their termination, without prejudice to their seniority or other rights and privileges previously enjoyed, and make them whole for any loss of earnings including vacation benefits they may have suffered because of the discrimination practiced against them by payment to them of a sum of money equal to that which they normally would have earned from the date of the discrimination to the date of reinstatement in accordance with the method set forth in *F. W. Woolworth Co.,* 90 NLRB 289 (1950).[3] See also *Dean General Contractors*, 285 NLRB 573 (1987).

Because the record also shows that the Respondent has not engaged in good-faith bargaining, it will be ordered to provide information requested and to bargain in good faith with the Union. I also find that a broad order is warranted because the Respondent has shown a proclivity to violate the Act and has engaged in such egregious and widespread misconduct as to demonstrate a general disregard for employees statutory rights, *Hickmott Foods*, 242 NLRB 1357 (1979).

[Recommended Order omitted from publication.]

[3] Under *New Horizons*, interest is computed at the short term Federal rate for the underpayment of taxes as set out in the 1986 amendment to 26 U.S.C. § 6621.